BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENDALL SUTTON	)	
Claimant	)	
	)	
VS.	)	
	)	
ALLIED WASTE NORTH AMERICA	)	
Respondent	)	Docket No. 1,052,434
	)	
AND	)	
	)	
AMERICAN ZURICH INS. CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 21, 2011, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Andrea F. Chambers, of Kansas City, Missouri, appeared for claimant. John R. Emerson, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found claimant's failure to use his seat belt was willful. And because the failure to use the seat belt was the cause of claimant's injuries, the ALJ denied claimant's request for workers compensation benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 20, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant contends he sustained an accidental injury that arose out of and in the course of his employment with respondent. He further contends his failure to use a seat belt at the time of his accident was from negligence and carelessness, not willfulness, and did not take his activities beyond the course and scope of his employment. Claimant also argues that respondent cannot rely on failure to use a safety device as a defense because it did not fully enforce its rule that required use of seat belts. Accordingly, claimant asserts

he is entitled to workers compensation benefits in the form of medical treatment and temporary total disability compensation for the period of August 25, 2010, to February 22, 2011.

Respondent agrees that claimant was injured while operating its trash truck. However, respondent contends claimant willfully violated a safety procedure that resulted in his accident and injuries and, therefore, his claim for workers compensation benefits was properly denied by the ALJ. Respondent further argues that claimant was terminated for cause and should be denied temporary total disability benefits. In addition, respondent contends that the evidence shows claimant was able to perform jobs available to him within his restrictions and was not temporarily totally disabled.

The issues for the Board's review are:

(1) Was claimant's failure to use his seat belt a "willful failure to use a guard or protection against accident"?[1]

(2) Is claimant entitled to medical treatment and temporary total disability benefits? Does the Board have jurisdiction over this issue?

FINDINGS OF FACT

Claimant was employed by respondent as a commercial front loader. His job was to pick up trash from businesses and apartment complexes and then take the trash to the landfill. On August 25, 2010, claimant had made his last stop and proceeded to the landfill. He first stopped at the scales, where the load was weighed, and then proceeded to the dump site. He dumped the load at the landfill and was traveling back to the scales when the truck hit a wall. The driver's side door opened, and claimant was ejected from the truck. He injured his left hand, right hip and right shoulder. At the preliminary hearing, claimant was asking for medical treatment of his injuries as well as temporary total disability benefits from the date of the accident through February 22, 2011.

Claimant admitted that at the time of the accident, he was not wearing a seat belt, although he was aware that respondent had a policy that required him to wear his seat belt at all times while operating the truck. Claimant stated, "I really don't know why I didn't wear my seat belt that day."[2] When claimant arrived at the landfill on August 25, he took his seat belt off when he exited the vehicle to weigh in. Then he drove down the haul road to the dump site. It took him about 30 minutes to get from the scales to the dump site. When he

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[1] K.S.A. 2010 Supp. 44-501(d)(1).

[2] P.H. Trans. at 11. Claimant said he had been wearing his seat belt when he was on his way to the dump site after finishing his route. P.H. Trans. at 29.

was at the landfill, he got out of his truck to make sure all the trash had cleared the hopper. When that task was done, he got back in the truck. He did not put his seat belt on. It would have taken him another 30 minutes to drive back to the scales. The accident occurred after claimant had dumped his load but before he had returned to the scales. He was on the private haul road. He was not required to get out of his truck after making the dump before reaching the scales. He stated he usually put his seat belt on when he exited the landfill after he passed the scale house and got back onto a public road. Claimant admitted that there was a sign indicating he should fasten his seat belt after leaving the landfill. The accident occurred about a block or two after he passed that sign, while he was still on the haul road.

Antonio Arduengo, respondent's operations supervisor, testified that respondent has a policy requiring its employees to wear seat belts.[3] That policy was in effect on August 25, 2010. Claimant was provided with a vehicle that had seat belts, which he was supposed to wear at all times while operating the vehicle.

Mr. Arduengo said that respondent's vehicles, including claimant's vehicle, contained in-cab cameras with a view directly into the cab. The camera is used to capture unsafe behaviors by drivers, and the videos are then used for training purposes. A copy of the video from the vehicle claimant was driving at the time and place of the accident was made an exhibit to the preliminary hearing. The video showed that claimant was not wearing a seat belt at the time of the accident. Claimant said he did not remember what he was doing at the time he hit the wall. But the video shows that immediately before the accident, claimant, while driving, was reaching into what appeared to be a lunch bag. Claimant denied he was reaching for any food, stating that he kept other items in the bag other than his lunch, including paperwork and a two-way phone issued to him by respondent. He could not remember what he was searching for in the bag. He was aware that respondent had a policy that he was to have his attention focused on the road.

Mr. Arduengo said that videos from claimant's vehicle were reviewed about once a week. Claimant was noted to have driven multiple times without having his seat belt on. Mr. Arduengo said that after the observations of claimant's conduct in not wearing a seat belt, claimant was told to wear his seat belt at all times. This was not a disciplinary step but was, instead, a coaching technique. Claimant was given no written reprimands on the occasions he was found not to have worn his seat belt.

Mr. Arduengo said that respondent had an informal policy to provide injured workers with light duty work. But claimant was terminated after the accident on August 25, 2010, because it was his second accident within a one-year period. Claimant testified that after

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[3] " . . . all employees who drive or operate a Company vehicle, truck or heavy equipment, are responsible for: . . . . 16. Utilizing defensive driving techniques and wearing seatbelts as required." P.H. Trans., Resp. Ex. 1 at 6-7.

he was terminated, he applied for and received unemployment benefits. As a result, he filled out paperwork indicating that he was ready and able to work. He was also required to look for jobs, which he did. Claimant admitted that there were jobs he could have performed within the restrictions he was given. He started working for Deffenbaugh about a week before the preliminary hearing.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

K.S.A. 2010 Supp. 44-501(d)(1) provides:

> If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The foregoing statute is supplemented by K.A.R. 51-20-1 which provides:

> The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2010 Supp. 44-551(i)(2)(A) states in part:

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[4] K.S.A. 2010 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[7]

ANALYSIS

Claimant was injured in part because of his failure to wear the seat belt provided by respondent. Claimant's failure to use the seat belt was in violation of respondent's policy. Claimant knew of that policy, he had been trained concerning that policy, and his past violations resulted in his being reminded of the policy and coached to follow that required safety procedure. The policy was enforced by respondent. Claimant did not say he forgot to fasten his seat belt. Instead, claimant testified that he intended to wait to fasten his seat

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[6] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[7] K.S.A. 2010 Supp. 44-555c(k).

belt until he was on the public road. There was no such exception to respondent's policy. Under these circumstances, claimant's failure to use the seat belt was willful.

CONCLUSION

Claimant's injury resulted from his deliberate and willful failure to use his seat belt as required by respondent's safety rules. Accordingly, compensation for claimant's injury must be disallowed.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated April 21, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Andrea F. Chambers, Attorney for Claimant
John R. Emerson, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge